

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



74-1589

To be argued by  
DOUGLAS F. EATON

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 74-1589**

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

CHARLES W. FREDRICKSON,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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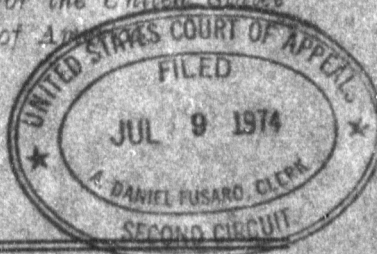
**BRIEF FOR THE UNITED STATES OF AMERICA**

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

Charles W. Fredrickson appeals from a judgment of conviction entered on April 16, 1974, in the Southern District of New York, after a two-day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment 73 Cr. 282, filed April 2, 1973, charged Fredrickson with three counts of evading federal income taxes in violation of Title 26, United States Code, Section 7201.

Fredrickson's first trial commenced on December 11, 1973, and ended on December 14 when Judge Motley declared a mistrial on the basis of jury disagreement. The second trial commenced on February 19, 1974. On February 20, the jury found Fredrickson guilty on all three counts.

On April 16, 1974, Judge Motley sentenced Fredrickson to concurrent terms of imprisonment of one year and one day. Judge Motley has allowed him to remain free on his own recognizance pending this appeal.

## **Statement of Facts**

### **A. The Government's Case**

Fredrickson was admitted to the New York bar in 1955. After working with the tax department of a Wall Street law firm, he opened his own office in Tuxedo, New York in 1960 (Tr. 92-93). He became the attorney for a wealthy elderly couple named Cornelius and Chloise Lee, and was listed as the prospective executor in Mrs. Lee's will (Tr. 37). In 1961, Mrs. Lee gave Fredrickson a power of attorney to sign checks against her checking account (GX 891; Tr. 90). From 1964 through 1966, he signed approximately 2,000 legitimate checks on her account for the Lees' expenses, which included nurses 24 hours a day (GX 894-906; Tr. 91). During the same period, he wrote 890 improper checks on her account without her consent (GX 1-890; Tr. 46). Fredrickson wrote these checks to myriad third parties for his own benefit; they totalled \$79,827.12.

In October 1966, the bank first realized that some of the checks were improper. A bank officer called Fredrickson in, showed him the most recent batch of checks, and then notified the Lees' daughter-in-law. A day or two later, she came to a meeting accompanied by David Watson, a New York City attorney. Fredrickson was asked to turn over all of the Lees' books and records (Tr. 72-73, 133-136). He turned over all the canceled checks, and helped to prepare a list as to which checks he had signed for his own use (Tr. 39, 137, 155-156; GX 923). On November 16, 1966, he signed a confession of judgment to Mrs. Lee for \$79,827.12 (Tr. 40; GX 924). Fredrickson has made two partial repayments, by turning over \$2,000 in December 1966 and a

valuable gun collection in March 1967 (Tr. 41, 43-45). He still owes almost \$44,000 (Tr. 66). The confession of judgment has never been filed, and the matter was never reported to any bar association or district attorney (Tr. 53-54, 73-74).

Ever since the improper checks were discovered, Fredrickson has claimed that he wrote them by mistake, in the honest belief that they were checks on his own checking account at the same bank. There was considerable evidence to refute that claim.\*

In any event, the \$79,827.12 was gross income to Fredrickson for the years 1964, 1965 and 1966, whether he obtained it deliberately or by mistake. *James v. United States*, 366 U.S. 213, 219-220 (1961). Fredrickson filed his federal income tax returns for all of those years on April 17, 1967, since he had failed to file timely returns for the earlier years. The returns did not mention any of the \$79,827.12. Fredrickson admitted before the grand jury that when he prepared the returns he was "aware" he had received almost \$80,000 from the Lees, although he said that he "had no

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\* Fredrickson's own checks had no name imprinted on them. Mrs. Lee's checks bore her name, at first. Fredrickson used this type of check for his own benefit 22 times, mainly at the outset of his misappropriations (GX 1-12, 16-17, 21-22, 98, 190, 207, 274, 591, 642). On or before October 14, 1964, Fredrickson or his secretary (who was gravely ill and could not testify—Tr. 163) ordered new checks for Mrs. Lee's account and obtained checks with no name imprinted on them (Tr. 196-197). These checks were then used for practically all of the misappropriations from that point on (GX 30-97, 99-189, 191-206, 208-273, 275-590, 592-641, 643-890). These checks were yellow and thus were distinctively different from Fredrickson's checks and from the other Lee checks which did bear her name. During one period in December 1964 and January 1965, Fredrickson's secretary began using one book of the yellow checks (GX 898) to prepare checks for the Lees' expenses; before finishing that book she abruptly switched back to the Lees' normal gray checks (GX 899).

connection" between the Lee matter and his returns (Tr. 94-95). The Lee matter was brought to his attention repeatedly during the five months prior to the filing of his returns (Tr. 40-45).

A few months after he filed the returns, he had a series of conversations with Watson which evidenced consciousness of guilt. Watson was considering whether to claim an embezzlement loss deduction on Mrs. Lee's 1966 income tax return, for which an extension of time had been obtained, and on her 1965 return, which he was thinking of amending. He so advised Fredrickson. In an attempt to dissuade Watson from informing the Internal Revenue Service, Fredrickson, by himself and through an attorney, made empty promises to repay more of the remaining debt and argued that the IRS would disallow such a deduction. As a result, Watson told the Lees' accountants not to claim a loss deduction on the Lee returns (Tr. 51-60). The IRS learned of the matter much later, in the following manner: Mrs. Lee died, and in 1969 her estate tax return listed the confession of judgment as an asset and stated that its value was only \$28,250.00. When the IRS questioned this item, Watson revealed the embezzlement and explained that it was unlikely that Fredrickson would make any further repayments (Tr. 60-65). Watson's prediction proved to be accurate.

## **B. The Defense Case**

Fredrickson called Dr. Benjamin Fabrikant, a psychologist whom he has consulted from mid-1966 to the present. Dr. Fabrikant testified that, in his opinion, Fredrickson suffered loss of memory at times, particularly after severe emotional stress, and that, in his opinion, Fredrickson did not have the Lee money on his mind when he filled out his tax returns (Tr. 109, 115-116).

Fredrickson took the stand in his own defense. He testified that marital arguments had created emotional stress and affected his ability to work (Tr. 130-31, 146-47). He said that when he wrote the 890 checks he had mistakenly believed that he was writing on his own checking account. At one point in his testimony, he said that the mistake occurred because he had two different checkbooks in one desk drawer (Tr. 167). Later, however, he said that he had deliberately maintained two checkbooks, and kept the book of yellow checks in a separate bottom drawer to hide certain purchases \* from his wife. He admitted that these purchases exceeded the modest balance in his own account, but he said that he had never realized this because he never reconciled his bank statements (Tr. 174-181). He also said that he and his secretary did not reconcile Mrs. Lee's bank statements (Tr. 164). He said he had improperly used at least six successive books of yellow checks and that he had maintained records in the stubs. The six books of stubs were missing, and he could give no satisfactory explanation for their disappearance (Tr. 150, 154-155, 172). Despite his confession of judgment and his stipulations at the trial, he denied that the 22 checks which were imprinted with Mrs. Lee's name had been used improperly (Tr. 157-160).\*\* Fredrickson said that when he prepared his tax returns he simply did not have the \$79,000 in his mind (Tr. 141, 190).

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\* It was plausible that he concealed his numerous gun purchases from his wife. But most of the 890 checks were used to pay expenses which she obviously knew about, such as college tuition and other routine bills. The main thing he was hiding was that he simply did not have the money to pay his bills.

\*\* However, eight of these checks (GX 12, 21, 98, 190, 207, 274, 591, 642) were never recorded in the stubs of Mrs. Lee's checkbooks, and were apparently ripped from the back of her checkbooks.

## ARGUMENT

### POINT I

**The Court properly allowed the jury to consider, on the issue of intent, evidence introduced by both parties as to whether or not the defendant deliberately embezzled the money; the Court clearly instructed the jury that the defendant was not on trial for embezzlement.**

In order to prove that Fredrickson owed additional tax, the Government necessarily had to prove that he took the \$79,000. Whether he took it deliberately or mistakenly did not affect the fact that he owed additional tax. But the crucial issue in the case was the issue of intent—whether Fredrickson intended to evade taxes. In resolving the issue of whether he deliberately cheated the Government, the jury was entitled to consider whether he had deliberately cheated Mrs. Lee when he acquired the income. This Court has adopted the inclusory rule as to evidence of other crimes, that is, such evidence is admissible except when offered solely to prove criminal character, *United States v. Deaton*, 381 F.2d 114, 117-118 (2d Cir. 1967). In the case at bar, the evidence of embezzlement was offered to prove Fredrickson's intent to defraud the Government.

At the outset of the trial, Fredrickson urged the Court to prohibit any proof of embezzlement. Judge Motley ruled that such proof would go to the question of whether Fredrickson had intended to pay his taxes (Tr. 29). The

Government then presented such evidence.\* Fredrickson later presented his own evidence to the effect that he had not deliberately embezzled the money.\*\* On appeal, Fredrickson appears to concede that Judge Motley's ruling on admissibility was correct. Shifting his ground,\*\* he

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\* The Government relied on two types of evidence concerning embezzlement. The first type was the logical inferences from certain documents which were received in evidence without objection, from their appearance and sequence, and from Fredrickson's testimony about them (GX 1-890, 892-906, 911-916; see Tr. 221-225). The second type was Watson's testimony that he told Fredrickson he was considering claiming an "embezzlement loss deduction" and that Fredrickson reacted by attempting to dissuade Watson from informing the Internal Revenue Service (Tr. 51, 53-54, 56, 58, 60). While Watson was on the stand, Judge Motley instructed the jury that they were not bound by Watson's conclusion as to whether there was an embezzlement (Tr. 87-88).

\*\* Fredrickson contended that his misuse of the 890 checks was symptomatic of the same disorganized, forgetful state of mind which, according to him, established his innocence of the tax evasion charge. It was obvious, especially after the first trial, that this was the cornerstone of his defense. The Government was entitled to introduce the evidence that he cheated Mrs. Lee, without waiting for him to introduce contrary evidence in support of his defense of lack of willfulness. *United States v. Johnson*, 382 F.2d 280, 281 (2d Cir. 1967); *United States v. Deaton, supra*, at 118, n. 3.

\*\*\* Fredrickson made only one request to charge on this subject: "4. I hereby charge you that the only question that you are to decide is whether the money that the defendant received is taxable, and not whether or not the defendant illegally, improperly, or imprudently took money from the Lee's [sic] and my [sic] in fact be guilty of the crime of embezzlement. That has absolutely no relationship to the question of whether or not the defendant knowingly and willfully did attempt to evade the payment of federal income tax. Other crimes or other deeds are not the issue here." This request was properly denied (Tr. 202). On appeal, Fredrickson does not claim that it should have been granted. Moreover, after Judge Motley's charge, he did not specifically except to her instruction on this subject (Tr. 248-250), but instead merely repeated his general exception to all of her denials of his requests (Tr. 252-253).

now criticizes Judge Motley's instructions to the jury concerning the evidence of embezzlement. These criticisms are totally unfounded.

Fredrickson claims that the jury was instructed as a matter of law that the money had been taken by mistake. It is hard to imagine how such an instruction could have prejudiced Fredrickson, but the simple fact is that no such instruction was given. Judge Motley stated the contentions of the parties and then left it to the jury to consider whether the money was taken by embezzlement or by mistake (Tr. 243-244).\*

Fredrickson also claims that Judge Motley confused the specific criminal intent required by the tax evasion statute with the intent required for embezzlement. In fact, Judge Motley told the jury:

Unless you find that the defendant had a specific intention of evading or defeating a tax that he knew to be due over and above the tax shown on the return, then you must acquit the defendant. \* \* \*

\* \* \* \* \*

Defendant is on trial only for the offense alleged in the indictment, and that is income tax evasion. He is not on trial for embezzlement or for improperly taking money, but whether the money was embezzled, as claimed by the Government, or taken by mistake, as claimed by defendant, is involved in this case, as I have already indicated (Tr. 248-250).

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\* These conflicting contentions were material to the element of intent, but they were immaterial to the element of whether Fredrickson had additional taxable income. Judge Motley so instructed the jury (Tr. 245). Fredrickson excepted to that portion of the charge (Tr. 252-253). However, the law is clear that the money was taxable income whether it was taken deliberately or by mistake, *James v. United States, supra*, at 219-220. Fredrickson does not dispute this on appeal.

## POINT II

**The Court properly cut off defense counsel's argument that the money was a loan, or that Fredrickson may have thought it was; the argument was contrary to Fredrickson's own testimony.**

Fredrickson contends that the Court acted improperly when it excluded his "unauthorized loan" \* defense. Although his brief is confusing, this purported defense consisted of two contentions: (1) that the money was not taxable income, and (2) that Fredrickson may have thought that the money was a loan and therefore not taxable. Both contentions were contrary to his own testimony.

The first contention can be disposed of quickly. It hinges upon the fact that Fredrickson signed the confession of judgment and made a \$2,000 repayment before the close of the third taxable year, 1966. Fredrickson claims that these facts mean that the \$79,000 which he received in 1964, 1965 and 1966 was not taxable income. He cites only one case which is at all on point, *United States v. Merrill*, 211 F.2d 297 (9th Cir. 1954).\*\* Merrill, as executor for his widow's estate, took his executor's fee out of her segregated share of their community property in 1939 and 1940. In 1940 he learned that he should have taken one-

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\* This phrase is nonsensical in the context of the case at bar. It would apply to situations such as: an officer commits a corporation to a loan which he has apparent authority to make, but which exceeds his actual authority. Fredrickson found this phrase in a case whose facts were radically different, *Scudder v. Commissioner*, 405 F.2d 222 (6th Cir. 1968). He cited the case to Judge Motley, but has not mentioned it on appeal.

\*\* Fredrickson made no claim that he had read the *Merrill* decision prior to filing his returns. He has cited the case only on the legal issue as to whether the \$79,000 was taxable income.

half of the fee out of his own share. Before the close of 1940 he made an appropriate bookkeeping entry, and he actually repaid the money in 1943. The Ninth Circuit held that the money received by mistake in 1939 was taxable income, but the money received by mistake in 1940 was not, because Merrill had relinquished his claim to the money in the same year. The Court stressed Merrill's good faith and his full repayment in 1943.

Aside from the obvious distinction that Fredrickson has repaid only 44 per cent, the *Merrill* decision is no longer good law \* in view of the Supreme Court's *James* decision. The Supreme Court noted that "gross income" excludes loans, but held that it includes any monies acquired, whether mistakenly or deliberately, "without the consensual recognition, express or implied, of an obligation to repay." *James v. United States, supra*, at 219. It is obvious that there is no "loan" unless there is such "consensual recognition" at the time of the acquiring.\*\* A subsequent promise to repay is immaterial, but actual repayment entitles the repayer to a deduction in the year of repayment. *James v. United States, supra*, at 220. Judge Motley explained this to the jury (Tr. 245). Thus Fredrickson was entitled to deductions of \$2,000 in 1966 and of the value of the gun collection in 1967, but the \$79,000 was taxable income as a matter of law.

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\* *Merrill* was specifically rejected in Judge Oakes' concurring opinion in *Buff v. Commissioner*, — F.2d — (2d Cir., Apr. 5, 1974), although the majority opinion was content to distinguish it.

\*\* Fredrickson conceded that there was no such consensual recognition in this case (Tr. 208).

Fredrickson's second contention, that he may have thought that the money was a loan, cannot be understood without a recitation of his testimony and the proceedings below. At the first trial Fredrickson testified that he *presently* considered the \$79,000 as "a loan that I had to repay." However, he testified that *when he prepared the tax returns* he did not think of the \$79,000 in any way at all (Tr. of the first trial, pp. 223-224). Defense counsel then made an inconsistent argument to the jury concerning Fredrickson's state of mind at the time he prepared the returns—either he did not think of the \$79,000 at all or, if he did think about it, he thought it was "inadvertently borrowed" (Tr. of the first trial, p. 282). Judge Motley's instructions allowed the jury to consider this inconsistent defense (Tr. of the first trial, pp. 347-348). After the jury failed to reach a verdict, the judge questioned whether there had been any evidence to support the second part of the inconsistent argument, and she directed the parties to file briefs on this subject. At the start of the second trial there was a colloquy on this subject (Tr. 2, 17-22).<sup>\*</sup> Fredrickson's attorney acknowledged that the defense was inconsistent (Tr. 21).

On the Government's direct case, Watson testified that neither he nor Fredrickson ever suggested that the \$79,000 should be treated as a loan (Tr. 62-63). Fredrickson's attorney was permitted to make his opening statement after the Government rested, and he presented the inconsistent defense at length (Tr. 100-102). Fredrickson then testified on this subject at Tr. 138, 141, 189-193, 199-200. The crux of his testimony was as follows:

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<sup>\*</sup> During this colloquy Judge Motley commented that she did not "understand" defense counsel's brief (Tr. 2, 17). This was a polite way of saying that the brief was inconsistent and totally unpersuasive. Her questions show that she understood perfectly what the defense was, yet Fredrickson cites the comment to make the audacious suggestion that she should have disqualified herself from presiding at the second trial. No such suggestion was made at the trial.

Q. \* \* \* Did you think of this \$79,000 as a loan at the time you were preparing and filing your tax returns? A. At the time I prepared my tax returns, the whole matter was out of my mind (Tr. 190).

\* \* \* \* \*

Q. \* \* \* I am asking you whether during that six-month period of time, from October, 1966, to April, 1967, you thought of it, that \$79,000, as a loan. I am not talking about the debt or whether you had to repay it; but did you actually think it was something you had borrowed, a loan? A. In a way, yes. When I signed the Confession of Judgment, it was an acknowledgment of that debt and that had to be liquidated.

Q. Aside from the fact that it was a debt and you had to repay it, did you ever think that you had borrowed it? A. No. \* \* \* (Tr. 191).

Judge Motley then advised the parties that she would not include "the loan matter" in her charge\* (Tr. 203).

During the summation by Fredrickson's attorney, the following ensued:

Mr. Auerbach: \* \* \* If you feel, after listening to all the evidence, looking at the witness and forming your own opinion about him that Charlie was suffering from a mental problem and when he prepared the return he really blocked it out of his mind, at that moment he did not then knowingly

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\* At Tr. 202 Judge Motley rejected Fredrickson's only request to charge on this subject, which read as follows: "18. In prosecution for income tax evasion, where accused had stated that certain monies were received as a loan, Government had burden of proving that accused's explanations were false in order to justify inference that alleged loans were in fact taxable income. *United States v. O'Malley*, D.C. Pa. 1955, 131 F. Supp. 409."

and willfully commit the crime, *that is the issue that I want you to consider. Oh, there are many others which I would like to think about. If we want to think about this as a loan or debt*, it was unauthorized, there is no doubt about that, he didn't know it was a loan when he took it because he didn't even know he was taking it, but as soon as it was discovered, he acknowledged it. Who prepared this Confession of Judgment; who accepted it? The estate. Did he make payments? Yes. Maybe it wasn't a loan when it was taken, but *was it a loan? Could it have been treated as a loan by Charlie in his mind?*

Mr. Eaton: Your Honor, I must object. I don't believe there is any evidence to suggest that at all.

Mr. Auerbach: Your Honor, if I may—

The Court: There is no evidence that there was a loan here. I don't know what this is about. Are you now introducing evidence that there was a loan?

Mr. Auerbach: Your Honor, it was my understanding—

The Court: There is no evidence in this case that it was a loan (Tr. 212-213, emphasis supplied).

The argument not only had no support in the evidence, but was directly contrary to Fredrickson's own testimony that he simply did not have the money in his mind and that he did not ever think that he had borrowed it. Accordingly, Judge Motley's ruling was correct. See *United States v. Terrell*, 474 F.2d 872, 876-877 (2d Cir. 1973).

### POINT III

#### **The Court's evidentiary rulings were correct.**

Fredrickson raises brief objections to three evidentiary rulings.

A. Watson's 3500 material showed that he told the IRS in 1971 that he believed that Fredrickson had drawn the checks without any criminal intent. This belief was obviously based on what Fredrickson told him, rather than his own observations, since he only met Fredrickson once before the discovery (Tr. 37). On appeal, Fredrickson claims that the Court prevented him from introducing Watson's belief for any purpose. In fact, the Court allowed it to be introduced at Tr. 87-88, over the Government's objection.

B. Government Exhibit 923 was a typewritten schedule describing the 890 checks. Fredrickson claims that the best evidence would have been the original handwritten schedule. However, the confession of judgment (GX 924) was received in evidence and it had been computed on the basis of the typewritten schedule (GX 923; Tr. 40). Moreover, Fredrickson stipulated that the 890 checks were improper misappropriations (Tr. 46). Thus the introduction of GX 923 was not error, much less prejudicial.

C. Watson had in front of him his contemporaneous notes of conversations that he had with Fredrickson. Contrary to Fredrickson's brief, these notes simply were never introduced into evidence. Watson testified about these conversations on the basis of his recollection as refreshed by the notes. This was made clear to the jury at Tr. 48-49.

## POINT IV

**Fredrickson's status as an attorney was not held against him as a matter of law; he was allowed to make his claim of ignorance of the tax laws.**

By its verdict, the jury found that Fredrickson, contrary to his testimony, did remember the \$79,000 when he prepared his returns. But Judge Motley instructed them that they had to find, in addition, that he "knew that he had taxable income which he failed to report" and "that he knew a tax was due on that money" (Tr. 247, see also 248-249). In this connection, the Government introduced evidence that he was admitted to the bar in 1955, was once with the tax department of a New York City law firm, and had prepared returns for other individuals and for estates and trusts (Tr. 92-93). Judge Motley correctly ruled that the jury could conclude from that evidence that the defendant acted wilfully (Tr. 96-96a). Fredrickson did not object to this evidence, and his appeal brief acknowledges that it was proper evidence for the jury's consideration. *United States v. Alker*, 260 F.2d 135, 148 (3rd Cir. 1958), cert. denied, 359 U.S. 906, rehearing denied, 359 U.S. 950 (1959). Yet Fredrickson claims that his status as an attorney was held against him as a matter of law. On the contrary, Judge Motley's charge merely mentioned this fact in the course of a scrupulously fair summary of the parties' contentions with respect to wilfulness (Tr. 249-250).

Fredrickson was given wide latitude to rebut the Government's general evidence about his knowledge of tax law. He testified that he had once known that embezzlement income was not taxable, and that he had not learned of the Supreme Court's 1961 *James* decision which overruled the prior law \* on this subject (Tr. 141, 187). He also said

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\* *Commissioner v. Wilcox*, 327 U.S. 404 (1946).

that he had not known that money received by mistake was taxable, and did not recall the Supreme Court's 1951 and 1953 decision \* on that subject (Tr. 188-189). Defense counsel was given complete freedom to press this contention in his summation (Tr. 209, 213-214).

Watson also happened to be an attorney, and Fredrickson complains that the cross-examination of Watson was unfairly limited. This complaint is frivolous. Defense counsel was allowed to ask Watson, over objection, what he meant when he used the word "embezzlement" in conversations with Fredrickson (Tr. 68). When he asked Watson about particular elements of the crime of embezzlement, and whether Watson had been familiar with the *Wilcox* and *James* decisions, the Government's objections were correctly sustained (Tr. 66-70). Watson's knowledge was not an issue in the case, Fredrickson's was.

## POINT V

### The Court did not disparage the defense.

For the first time, Fredrickson complains about those parts of Judge Motley's charge which discussed the psychological defense. These instructions were fair and complete (Tr. 237-238, 249). No exception was made at trial. Indeed, Judge Motley took one of her key sentences almost verbatim from one of Fredrickson's requests to charge.\*\*

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\* *United States v. Lewis*, 340 U.S. 590 (1951); *Healy v. Commissioner*, 345 U.S. 278 (1953).

\*\* Judge Motley said: "Thus, if you find the whole episode of the taking of the money was completely blocked out of the defendant's mind at the time he prepared his returns, you must acquit him" (Tr. 249). Fredrickson had requested: "7. \* \* \* If you find from the testimony aduced [sic] that the whole episode of the taking of the monies was completely blocked out of his mind at the time of the preparing of the tax returns, \* \* \*."

Fredrickson also claims that Judge Motley summarily denied his voir dire requests. He made 34 requests. After careful consideration (Tr. 3-14) Judge Motley granted 22 and denied 10 and two were withdrawn. Among the requests she granted was the following:

"29. Do you have any preconceived ideas or prejudices with regard to the testimony of a psychologist which would prevent you from weighing that testimony and assessing the credibility of a psychologist witness in the same manner as any other witness?"

### CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

PAUL J. CURRAN,  
*United States Attorney for the  
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Attorney for the United States  
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DOUGLAS F. EATON,  
S. ANDREW SCHAFER,  
*Assistant United States Attorneys,  
Of Counsel.*



AFFIDAVIT OF MAILING

STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss.:

DOUGLAS F. EATON, being duly sworn,  
deposes and says that he is employed in the office of the  
United States Attorney for the Southern District of New York.

That on the 9th day of JULY, 1974  
he served ~~TWO COPIES~~ of the within BRIEF  
by placing the same in a properly postpaid franked envelope  
addressed:

PAUL I. AUERBACH, ESQ.  
P.O. BOX #6  
TAPPAN, NEW YORK 10984

And deponent further says that he sealed the said envelope  
and placed the same in the mail drop for mailing  
AT the United States Courthouse, Foley Square,  
Borough of Manhattan, City of New York.

Douglas F. Eaton

Sworn to before me this

9th day of July 1974

Ralph I. Lee

RALPH I. LEE  
Notary Public, State of New York  
No. 41-2292838 Queens County  
Term Expires March 30, 1975